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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 534

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants,

VERSUS

HARRY R. MOSS, ET AL.,
Appellees.

MOTION TO DISMISS

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HARRY R. MOSS, ET AL.,
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MOTION TO DISMISS

This Motion to Dismiss is directed to the appeal of the Oklahoma Farm Bureau and Lewis H. Munn, Intervenors, who intervened in the matter on July 31, 1962. This appeal from the three-judge United States District Court for the Western District of Oklahoma, is one of three that has been lodged. In No. 476, October Term, 1963, a Motion to Dismiss was heretofore filed against an appeal taken by state officials who had requested the court below to act in the manner in which it ultimately acted. No Motion to Dismiss has been filed, nor will one be filed by this Appellee against the third appeal brought by a majority of the State Senate who consistently opposed any action by the Court below and thereby preserved their record for appeal. This Appellee further submits that if there are to be further hearings in this proceeding it would be most appropriate

that those who have been responsible for the failure to preserve constitutional rights in the State of Oklahoma should carry the burden on appeal.

FACTS

This action was instituted in the United States District Court for the Western District of Oklahoma on January 31, 1961. No material action was taken pending the ruling in *Baker* v. *Carr*, decided March 26, 1962.

Thereafter a hearing on April 23, 1962, resulted in a 2 to 1 decision denying immediate injunctive relief which would have affected the then pending primary elections and the composition of the present Legislature (Appellants' Appendix I, pp. i through xxiv).

Thereafter on June 12, 1962, further hearings were held and the Court's ruling which is reported at 207 F. Supp. 898 (Appellants' Appendix IV, pp. xxvi through xxxviii) was entered on June 19, 1962.

The Interlocutory Decree was entered on June 19, 1962, adjudging that the statutes of the State of Oklahoma relating to apportionment were invidiously discriminatory against the plaintiff and his class and were null and void (Appellants' Appendix III, pp. xxv, xxvi). This Decree provided that the matter be continued until July 31, 1962 "for the effectuation of appropriate relief and final judgment."

On July 31, 1962, these Appellants for the first time entered the case. On that date they filed their application to intervene and their answer printed as the Appendix

hereto. They filed no subsequent pleading until after all hearings were concluded when they filed Findings of Fact, Conclusions of Law and a proposed Decree.

The prayer of Appellants' Answer states:

"WHEREFORE, your Intervenors pray:

"(1) That this action be continued until ten (10) days after an election is held on the pending Initiative Petition; that in the event said Petition and Amendment to the Constitution is adopted by the voters of the State of Oklahoma, that this action be then dismissed;

"(2) If the same should fail to pass and be adopted, that this Court then continue this cause to a date subsequent to the convening date of the Oklahoma Legislature, affording it a reasonable time within which to effect a Constitutional re-apportionment;" (in the body of the Answer thirty days after convening was suggested as a reasonable time)

"(3) In the event neither the Initiative Petition nor appropriate Legislation is adopted, then that this Court proceed to make re-apportionment in accordance with the present, existing Constitutional formula."

The Decree entered pursuant to the July 31, 1962 hearing was filed August 3, 1962 (Appellants' Appendix V, p. xxxviii). In this Decree the court continued the matter until the 8th day of March, 1963, to afford an opportunity to the people of the State to vote on the then pending Initiative Petition creating an Apportionment Commission and to afford the Legislature which convened January 8, 1963, two months to discharge its constitutional responsibility to reapportion. This granted the relief sought by these

Appellants in paragraphs (1) and (2) of their prayer. The court then granted the relief sought in paragraph (3) but only after the Legislature had adjourned *sine die* more than one-third of a year after the court's final hearing on March 8, 1963. The court's final order did reapportion according to the Oklahoma Constitution; except only that the limit of seven representatives per county was held to be violative of the XIV Amendment and void (Appellants' Appendix VII, pp. lii through lxxi).

These Appellants in their answer, proposed for the trial court's use an apportionment formula which they called "ideal" and which they stated they believed should be adopted. That formula provided for 19 representatives for Oklahoma County and 15 for Tulsa County, based on the 1960 Census. Thus they asserted that there should be no limit of seven representatives to a county.

These Appellants have appealed and in their Jurisdictional Statement, pages 6 and 7, set out what they denominate "Questions Presented by This Appeal." None of these questions were raised in the pleadings by these Appellants.

The Initiative Petition was voted upon on November 6, 1962, and did receive a majority of all votes affirmatively cast in the election and was considered adopted by the Governor, Secretary of State and State Election Board, but at the instance of the State Senators, intervenors in this suit, the Supreme Court of Oklahoma held that such petition was not adopted. (See *Allen, et al.* v. *Burkhart, et al.*, 377 P.2d 821.)

The Court did subsequently judicially apportion by accepting the plan adopted by the state officers who were

de facto members of the Apportionment Commission established by the petition and approved by the Attorney General as conforming to the State Constitution.

LEGAL REASONS FOR DISMISSAL

The legal question involved in this motion is whether a party may appeal from a judgment which he has urged the Court to enter.

The following cases sustain the proposition that a party may not appeal from a judgment or decree which it has urged the trial court to enter:

Lindheimer, et al. v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 54 S.Ct. 658 (1934); *New York Telephone Co.* v. *Maltbie, et al.*, 291 U.S. 645, 54 S.Ct. 443 (1934); *Electrical Fillings Corporation, et al.* v. *Thomas & Betts Co., et al.*, 307 U.S. 241, 59 S.Ct. 860 (1939); and *Public Service Commission of Missouri, et al.* v. *Brashear Freight Lines, Inc., et al.*, 306 U.S. 204, 59 S.Ct. 480 (1939).

See also 69 A.L.R.2d 701 on: *Right of winning party to appeal from judgment granting him full relief sought.*

Where the relief prayed for by a party is granted he may not appeal from the judgment.

Mugford v. *Mayor and City Council*, Md., 44 A.2d 745, 162 A.L.R. 1101 (1946).

CONCLUSION

These Intervenors importuned the Court to grant a delay in affording relief to allow the people of Oklahoma an opportunity to vote on the Initiative Petition then pend-

ing. The Court did so! These parties further requested that the Legislature be given an additional period of thirty days after convening. The Court gave two months and then withheld action until the Legislature adjourned *sine die* without complying with either the Federal or State Constitution. Finally these Appellants specifically requested the Court to judicially apportion if the Initiative Petition and the Legislature both failed. The Court did this too!

These Appellants now seek to question the jurisdiction of the Court to apportion. We submit that under the established appellate rules and statutes they are not aggrieved parties entitled to appeal and that their appeal should be dismissed.

Respectfully submitted,

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November, 1963.

APPENDIX

(Caption omitted)

APPLICATION OF OKLAHOMA FARM BUREAU AND LEWIS H. MUNN TO INTERVENE

COME NOW Oklahoma Farm Bureau, an Oklahoma corporation, dedicated to the protection of the rights, liberties, and well being of its more than 40,000 farm and ranch families of Oklahoma, and Lewis H. Munn, individually, as its President, and as a citizen and qualified elector of the State of Oklahoma, and move to intervene in this action, in order to assert their rights and claims as set forth in their proposed Answer, of which a copy is hereto attached, on the following grounds: [Rule 24(a) and (b)].

The representation of the interests of these applicants by the existing parties to this action is inadequate, and these applicants will be bound, and all of the members of Oklahoma Farm Bureau will be definitely affected by the final judgment and determination in this action. In this connection, it is respectfully suggested that the position of the present parties may be summarized, as follows:

(A) The plaintiff seeks radical re-apportionment at the hands of this Court, but has submitted no plan or method therefor.

(B) The Governor as a defendant, admits the existence of mal-apportionment in the State of Oklahoma, and, while he mentioned the existence of an Initiative Petition then pending before the Supreme Court of Oklahoma, his answer was filed prior to the time the Supreme Court had approved said Petition, which provides for a Constitutional method of re-apportionment, and no supplemental answer has been filed, since said

Petition was approved, and now awaits action by the Governor and the people.

(C) The Attorney General, representing certain of the defendants, concedes mal-apportionment, but contends certain portions of the Oklahoma Constitution relative to representation violates the Fourteenth Amendment of the United States Constitution.

(D) The Oklahomans for Local Government would appear to prefer the present status quo of representation in Oklahoma.

Your applicant intervenors, as more fully reflected by their tendered Answer attached hereto:

(1) Assert that mal-apportionment does exist today.

(2) That re-apportionment should be effected in strict accordance with the provisions of the Oklahoma Constitution, as it exists, or as it may be modified by determination of the legal voters, not later than the general November election.

It is therefore obvious that the representation of the interests of these applicants, and the membership of Oklahoma Farm Bureau by existing parties to this action is inadequate; and this application is filed promptly pursuant to the authority and direction of the Board of Directors of Oklahoma Farm Bureau at its recent Board meeting. No delay will result, and your applicants will seek no delay in the final disposition of this case, by virtue of its being permitted to intervene.

Applicants' claim presents questions both of law and of fact, in common with those of the main action, although its prayer for relief differs with both that of the plaintiff and the existing defendants.

WHEREFORE, your applicants pray that they be granted leave to intervene herein, and to file their Answer as represented by the attached copy thereof.

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[APPENDIX]

(Caption omitted)

ANSWER OF INTERVENORS, OKLAHOMA FARM BUREAU AND LEWIS H. MUNN

COME NOW the intervenors, Oklahoma Farm Bureau and Lewis H. Munn, and for their Answer herein, assert:

I

Notwithstanding the fact that the intervenors herein, and the 40,000 farm and ranch families who are members of Oklahoma Farm Bureau, are presently in a favored position with regard to their present representation in the Oklahoma Legislature, they are, nevertheless, realistically conscious of the fact that the involuntary premium in Legislative representation which has been accorded to them, has been done so at the expense of the urban citizens of Oklahoma, which has resulted in the present mal-apportionment.

II

Such inequitable apportionment, your intervenors assert, is the result of the continued failure on the part of the Legislature to apportion the State in accordance with the formula set forth in the Constitution. Consistently, your intervenors have endeavored to generate action in the Legislative assembly to secure apportionment based upon the Constitution; and, in fact, have advocated Amendments to the Constitution to provide for a more realistic apportionment.

III

In contra-distinction to the positions assumed by the various parties to this action, your intervenors have always, and do now, allege and assert that any fair and equitable apportionment must be accomplished pursuant to the terms and formula as articulated by the Constitution of Oklahoma as it now exists, or, as it may be lawfully amended.

In this connection, it may be observed, that there are those in this proceeding who challenge not only the present statutory apportionment [with which challenge we agree], but, also question the competence of this Court to rationalize certain provisions of the Oklahoma Constitution relating to the selection of Legislative members, with the Equal Protection clause of the Fourteenth Amendment. The answer to this, of course, is that the Oklahoma Constitution does provide for a republican form of government. The Fourteenth Amendment of the United States Constitution was in effect in 1907 when Oklahoma was admitted to the Union, and Oklahoma's proposed Constitution was carefully scrutinized by Congress and by the President of the United States. It was assumed, and rightfully so, that our State Constitution would be complied with; and that such compliance would not run afoul of the Fourteenth Amendment. Unfortunately, each succeeding Legislature has not seen fit to implement the express provisions of our basic document. It therefore became appropriate for over 130,000 voting citizens of Oklahoma to avail themselves of another very important provision of our Constitution, to-wit: the Initiative. This Initiative Petition has now been approved by the Supreme Court of Oklahoma, subject only to a last minute Petition for Re-Consideration filed by the other intervenors herein. As soon as the ballot title is approved, and the Governor should call a special election, the measure could be voted on by the citizens of Oklahoma immediately. In any event, the people of Oklahoma will have an opportunity to express their opinion at the November election.

Since the Legislature has failed to act, the substance of this Petition is to form and create a Commission, by Constitutional Amendment, which *will* effectuate apportionment in accordance with the Constitutional formula.

The Initiative provision was also an integral part of the Oklahoma Constitution in 1907, when it was admitted to the Union; and is entitled to the same weight and consideration as every other portion of our Constitution. It

would be assumed that it was a safeguard inserted in our Constitution, patterned after the 1902 provision of the Oregon Constitution, to provide a remedial process by which any inequities in Legislative representation, such as now exists, could be rectified by the citizens adversely affected.

In this further connection, your intervenors assert, and it should be noted, that the plaintiff Mr. Moss, states that he brings this action for himself and all persons similarly situated. Presumably, and obviously, he refers by the term "those similarly situated," to all the legal voters in the large metropolitan centers of Oklahoma. This being true, since the metropolitan centers embrace a majority of the legal voters of Oklahoma, the plaintiff and the class he represents are in a position to implement and effectuate the present Constitutional formula by a favorable vote on the impending Initiative Petition.

IV

Your intervenors, therefore, assert that their position is:

1. That re-apportionment is not only desirable, but necessary.
2. But, that the Constitutional processes of our republican form of government, both in Oklahoma and in the United States of America, should be preserved; and
3. That the people of Oklahoma should therefore have an opportunity to vote on the proposed amendment to the Constitution, or if the proposed amendment should fail, then the Oklahoma Legislature (which has not had an opportunity to meet since either the decision in the Tennessee case, or since the Court's opinion of June 12), should be accorded at least thirty (30) days after con-

vening in January, to effect Constitutional apportionment, before this Court undertakes to perform the drastic operation of judicial re-apportionment.

In this connection, the Court will note from the Attorney General's Trial Brief of July 5, 1962, that he quotes extensively from the concurring opinion of Justice Clark in the case of Baker v. Carr, 82 S. Ct., 691. Your intervenors would observe that Justice Clark also included in his concurring opinion with the majority, the following significant statement:

> "Although I find the Tennessee apportionment statutes offend the equal protection clause, I would not consider intervention by this Court into so delicate a field *if there were any other relief available to the people of Tennessee*. But, the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls,' to correct the existing 'invidious discriminating.' Tennessee has no initiative and referendum."

V

In its annual formulation of policies, the membership and delegates of Oklahoma Farm Bureau have endeavored not to be selfish or arbitrary. They are fully cognizant of the differences between political and economic alignments in Oklahoma; but they are non-partisan and realistic, and have always given consideration to the rights and philosophies of individual citizens, and to the commercial, industrial and political groups and organizations of Oklahoma, knowing full well that what is beneficial to the State of Oklahoma, will, in turn, be of benefit to them. In its deliberations, the Board of Directors in the discharge of its duty of implementing these policies, has also been considerate and cognizant of the rights and purposes of other

citizens and groups. Your intervenors would therefore be less than frank with the Court, if this Answer should be interpreted as an endorsement of the present Constitutional formula for representation.

It is *not* satisfied. It recognizes there *has* been a shift of population to the metropolitan centers. It is cognizant of the fact that at least one House should be based substantially on population; but, adheres to the philosophy that the other House should certainly bear a definite relation to geography. Otherwise, if both Houses should be based solely on population, there would be no occasion for a bicameral Legislative assembly; and that the result would be purely unicameral.

As stated on May 24, by the Circuit Court of Maryland:

> "I feel, however, that one of the Houses (in Maryland, the Senate) can be constitutionally based upon area and geographical location regardless of population or eligible voters. Such an arrangement protects the minorities. It prevents hasty, although popular legislation at the time. It is based upon history and reason and helps to protect the republican form of government guaranteed to the States by Article IV, §4 of the United States Constitution. It preserves the checks and balances of the State Government which has worked so well under the Federal. Moreover, there would be little advantage in having a bicameral legislature if the composition and qualifications of the members were similar."

When the ratifying States and Congress adopted the Seventeenth Amendment to the United States Constitution in 1913, providing for the election by the voters of the separate states, of two Senators each to the United States

Senate, regardless of population, it was accomplished with full knowledge of the Equal Protection clause contained in the Fourteenth Amendment to the Constitution adopted in 1866; and when Oklahoma was admitted, it was with full knowledge that the election of the Legislature involving the factors of area and political subdivisions was not violative of the Civil War Amendment.

The ideal formula, as issued by the Department of Public Relations of Oklahoma Farm Bureau, your intervenors believe should be adopted through our regular Constitutional processes, is hereto attached, and marked "Appendix 1." It provides for 38 Senators and 124 House members, based largely on the studies conducted, and plans formulated by the late eminent authority, Dr. Thornton—except, that it eliminates the confusing flotarial system, and does provide for a minimum of one representative for each county, and 19 for Oklahoma County, and 15 for Tulsa County, based on the 1960 Census.

Intervenor reiterates its position, however, that whatever merit may inherently appear in the Oklahoma Farm Bureau formula, *the Constitutional formula must first be implemented;* and any changes or modifications should thereafter be adopted through the regular Constitutional processes provided by the Oklahoma Constitution.

VI

WHEREFORE, your intervenors pray:

(1) That this action be continued until ten (10) days after an election is held on the pending Initiative Petition; that in the event said Petition and amendment to the Constitution is adopted by the voters of the State of Oklahoma, that this action be then dismissed;

(2) If the same should fail to pass and be adopted, that this Court then continue this

cause to a date subsequent to the convening date of the Oklahoma Legislature, affording it a reasonable time within which to effect a Constitutional re-apportionment;

(3) In the event neither the Initiative Petition, nor appropriate Legislation is adopted, then that this Court proceed to make re-apportionment in accordance with the present, existing, Constitutional formula.

Respectfully submitted,

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